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ALEXANDER L. STEVAS,
CLERK

82-357

No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE STATE OF MICHIGAN,
PETITIONER,

v

RAYMOND CLIFFORD AND
EMMA JEAN CLIFFORD, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

JOINT APPENDIX

Petition for Certiorari Filed August 25, 1982
Certiorari Granted January 24, 1983

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INDEX

	PAGE
DOCKET ENTRIES	iia
TRANSCRIPT	3a
JOHN BEYER	
Direct Examination by Mr. Wouczyna	4a
Cross Examination by Mr. Ramsdell	10a
MARVIN MONROE	
Direct Examination by Mr. Wouczyna	18a
Cross Examination by Mr. Ramsdell	20a
Redirect Examination by Mr. Wouczyna	25a
Arguments by Mr. Wouczyna	26a
Arguments by Mr. Ramsdell	30a
Arguments by Mr. Wouczyna	31a
Arguments by Mr. Ramsdell	34a
Rebuttal by Mr. Wouczyna	37a
Rebuttal by Mr. Ramsdell	38a

DOCKET ENTRIES

Date	Proceedings
10-31-80:	arraignment on the warrant
12-15-80:	examination held; defendants bound over for trial
3-30-81:	evidentiary hearing held
4-14-81:	motion to suppress evidence and quash the information denied
7-17-81:	interlocutory appeal granted by Michigan Court of Appeals
3-29-82:	Court of Appeals reverses trial judge, suppresses evidence and dismisses case
6-29-82:	Michigan Supreme Court denies leave to appeal

No. 58278

STATE OF MICHIGAN

IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

THE PEOPLE OF THE STATE OF MICHIGAN

vs

Case No. 80-07406

RAYMOND AND EMMA JEAN CLIFFORD,
Defendants.

EVIDENTIARY HEARING

PROCEEDINGS HAD AND TESTIMONY taken in the above-entitled cause before the HONORABLE HENRY HEADING, Recorder's Court Judge, Frank Murphy Hall of Justice, 1441 St. Antoine, Detroit, Michigan, on Monday, March 30, 1981, Monday, April 13, 1981 and Tuesday, April 14, 1981.

APPEARANCES:

JAMES WOUCZYNA,
Assistant Prosecuting Attorney
Appearing on behalf of the
People of the State of Michigan

JACK RAMSDELL, ESQ.
Appearing on behalf of Defendants

SHIRLEY McCLAIN, CSR-2311
Official Court Reporter

Received December 1, 1981,
Court of Appeals
First District

INDEX

NAME AND EXAMINATION	PAGE
Monday, March 30, 1981	
JOHN BEYER	
Direct Examination by Mr. Wouczyna	4a
Cross Examination by Mr. Ramsdell	10a
MARVIN MONROE	
Direct Examination by Mr. Wouczyna	18a
Cross Examination by Mr. Ramsdell	20a
Redirect Examination by Mr. Wouczyna	25a
Monday, April 13, 1981	
Arguments by Mr. Wouczyna	26a
Arguments by Mr. Ramsdell	30a
Tuesday, April 14, 1981	
Arguments by Mr. Wouczyna	31a
Arguments by Mr. Ramsdell	34a
Rebuttal by Mr. Wouczyna	37a
Rebuttal by Mr. Ramsdell	38a

Monday, March 30, 1981
Detroit, Michigan

THE CLERK: Case number 80-07406, People versus Raymond and Emma Jean Clifford, offense arson, burning of a dwelling house.

MR. WOUCZYNA: James Wouczyna for the people at this evidentiary hearing.

MR. RAMSDELL: Jack Ramsdell representing the Cliffords, your Honor.

THE COURT: How many witnesses?

MR. WOUCZYNA: Initially two.

THE COURT: Are you going to call any, Mr. Ramsdell?

MR. RAMSDELL: No, I am not.

THE COURT: Why is it going to take so long?

MR. WOUCZYNA: I said a little while, your Honor.

THE COURT: All right.

MR. RAMSDELL: Your Honor, I would like to make a motion to have the witnesses sequestered at this time.

THE COURT: All right. Ready?

MR. WOUCZYNA: Yes, your Honor. Before I call any witnesses, I would just like to state to the court so the court has some idea of what we are focusing on here.

This is an evidentiary hearing that the defense requested on the issue of whether or not the warrant, the search and seizure here on a fire investigation, was reasonable, therefore, legal or illegal, your Honor.

THE COURT: All right.

MR. RAMSDELL: Your Honor, it's beyond that. We also question the validity of the search warrant that was issued six days after the initial one.

JOHN BEYER,

having been first duly sworn by the court clerk to tell the truth, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. WOUCZYNA:

Q. Please state your name, sir?

A. John Beyer.

Q. And, Mr. Beyer, what is your occupation?

A. I am a fire investigator lieutenant with the Detroit Fire Department arson section.

Q. How long have you been with the Detroit Fire Department?

A. I have been in the fire department nineteen and a half years, sir.

Q. How long have you been doing arson investigation?

A. Six and a half years.

Q. Lieutenant Beyer, on the date of October 18, 1980, did you have occasion to go to 13829 Linhurst in the City of Detroit?

A. I did.

Q. You know whose residence is at that particular address?

A. It was Ray Clifford.

Q. That would be the defendant in this case and his wife; is that correct?

A. Correct.

Q. And what was the reason you went to that address on that date?

A. To investigate a fire.

Q. What time were you informed that the Detroit Fire Department was informed that there was a fire?

A. I believe the initial run was at 5:42 A.M.

Q. And did you ever learn what time the firefighters left?

A. I believe it was 7:44 A.M., I can check to make sure.

Q. Would you, please, do that?

A. Correct time was 7:04 A.M.

THE COURT: Did you say 7:04?

WITNESS: Yes, sir.

THE COURT: All right.

Q. (By Mr. Wouczyna): So as far as you were concerned, the fire had been extinguished around seven o'clock that morning; is that right?

A. Correct.

Q. What time did you arrive at the residence?

A. 1:00 P.M.

Q. Was that your first occasion at the residence?

A. Yes.

Q. Could you describe to us what is at that address, please?

A. It is a two and a half story brick and frame dwelling, private residence.

Q. Can you, please, tell us why it was one o'clock P.M. when you arrived?

A. Yes, sir, my partner and I went on duty at eight o'clock in the morning. We had a prisoner, a defendant was turning himself in that morning, he did arrive in our office at nine o'clock. We had to process him on a warrant and take him to police headquarters to be arraigned that afternoon. I believe it was about 11:20 we had a multiple alarm fire that we had to investigate, I believe it was on Woodrow Wilson. My partner and I responded to that scene, investigated that fire, from there we stopped, had a brief lunch and then went to the scene on Linhurst.

Q. Is it unusual for you to have more than one fire to investigate in a particular work day?

A. Is it unusual?

Q. Yes.

A. No, sir.

Q. Now, when you arrived at 1:00 P.M., did you have a search warrant to enter the address of 13829 Linhurst?

A. No, sir.

Q. What did you do when you arrived?

A. Upon arrival, it was a boarder group on the scene and a man was in the basement pumping water from the basement.

Q. Do you know who that man was?

A. No, sir, I don't.

Q. Do you know who he was representing?

A. I don't recall, sir.

Q. All right, what happened?

A. We waited until he pumped water from the basement, at that time we entered the basement and began our investigation.

Q. Now, when you arrived at one o'clock, were you able to assess what type of damage had been done to that house because of the fire?

A. It had been a considerable amount of damage.

Q. At that point could you indicate whether or not you had thought the house was habitable or inhabitable?

A. It was inhabitable.

Q. At that point of your arrival, could you tell whether or not the house was locked or secured in any fashion?

A. At the time we arrived, it was open to trespassers.

Q. At the time you arrived, were the owners, either Raymond Clifford or Emma Jean Clifford or anyone of their family in the house or about the house?

A. No, sir, there was not.

Q. Before you went into the house, did you acquire any information as to where the Cliffords might be?

A. Yes, sir, we did.

Q. What was that?

A. A neighbor informed us that the Cliffords was up north and were not returning to the scene.

Q. And which neighbor was that, do you recall?

A. I believe his last name was Mott, if I am not mistaken.

Q. When you entered the home, could you be more specific in describing the extent of the damages?

A. We entered the side door, we could see the stairs to the second floor had collapsed, the kitchen floor had collapsed, it was sagging quite badly. The fire had gone up a wall adjacent to the basement stairway up to the second floor, considerable amount of fire damage, lot of structural damage.

Q. Had you received any information from any of the firefighters that had been there to extinguish the blaze as to whether or not there was suspected arson?

A. They had made it suspected arson, yes, sir or suspicion.

Q. Do you know what their suspicion was grounded on?

A. At the time we made the investigation, no.

Q. Fine. Sir, do you have a particular policy that you follow within the Detroit Fire Department as to when you will enter a building with or without a search warrant?

A. Yes, sir.

Q. Could you, please, tell us what that policy is that you follow?

A. If the dwelling is open to trespassers, nobody around, we will enter and investigate the fire. If the building is secure, we will leave a card, try to contact the owner occupant and seek permission to investigate the fire.

Q. Is there any time limit that you use?

A. In which regard?

Q. Into whether or not you will go into a building, in other words, if the building is unsecured, would you consider going in two weeks later?

A. Probably not.

Q. Okay. Is there someone, is there a supervisor you would check with first in a situation like that?

A. Yes, sir.

Q. Who would that be?

A. One of our captains, we have two captains.

Q. Do you know how much water was in this particular residence when you arrived?

A. At the time we arrived, it was approximately one foot of water in the basement.

Q. And you indicated that was being pumped out?

A. Yes, sir.

Q. Do you know the people that were pumping out the water, were they representatives of an insurance company?

A. I would assume they were with some building contractor hired by, assigned by the fire insurance adjustor or agent.

Q. They were none of your firefighters, though; is that correct?

A. No, sir.

Q. Now, upon entering the premises, did you then make an investigation as to the cause of the fire that had occurred earlier that morning?

A. Yes, sir, we did.

Q. And where was your investigation focused or concentrated?

A. In the basement beneath the basement stairway.

Q. And if you can be brief, what did you find to be the cause of the fire that occurred early that morning?

A. We found flammable liquid under the stairway and a timer mechanism setup.

Q. More or less an elaborate timer crock pot mechanism that you feel triggered the fire; is that correct?

A. Correct.

Q. Now, pursuant to your going into the premises at one o'clock, did you seize anything once you were inside?

A. After we entered the premises?

Q. Yes.

A. Yes, sir, we did.

Q. Could you, please, tell us those items that you seized?

A. Three cans labeled fuel, a remains of what resembled a crock pot, electric crock pot, a timer with a cord attached.

Q. Anything else at that time?

A. May I refer to my report?

Q. If it will help refresh your memory, please do.

A. That was all we seized.

Q. Fine. Now, were you, did you seize those items or discover those items before or after the water was pumped out of the basement?

A. After the water was pumped out.

Q. Would you have been able to investigate and discover those items as you did with the water still in the basement?

A. No, sir, we could not.

Q. Now, sir, could you, please, tell us what you would have done when you arrived at one o'clock in that building if that house was secured either by lock and key or by windows and doors boarded up?

A. We would have attempted to seek permission from the owners and lack of that, we would have gone for an administrative search warrant.

Q. If you would have found the resident of that premises or their representative at home, what would you have done?

A. Seek their permission if the building was secured.

Q. Fine. Sir, can you briefly tell us what your qualifications are as an expert of the field of arson detection?

A. I have attended a forty-hour fire investigators course conducted at the Criminal Justice Institute in Detroit, a fire investigators course conducted by the FBI, numerous seminars, attended Macomb County Community College, taken up fire science, testified in Recorder's Court, Circuit

Court, Juvenile Court. Member of the International Association of Arson Investigators, Michigan chapter, attended a eight to seven week police officer's training course at the Criminal Justice Institute, member of the police fire arson unit approximately two years, conducted a grand jury investigation in fraud type fires.

Q. Have you ever been declared an expert witness in a case, in a court case at any time?

A. Yes, sir, numerous times.

Q. How many times have you testified as an expert in the field of arson detection?

A. I can only estimate between a hundred and a hundred fifty times probably if not more.

Q. And can you tell us how many arson investigations you have made in your career, if you can?

A. Several thousands.

MR. WOUCZYNA: I have no further questions, your Honor.

MR. RAMSDELL: To begin with, to make everybody feel good, I would like to compliment the Detroit Fire Department and arson squad for a very thorough investigation.

CROSS EXAMINATION

BY MR. RAMSDELL:

Q. Lieutenant Beyer, you indicated that somebody suspected arson?

A. Firefighters responding to the scene placed a suspicious cause on the fire.

Q. Okay. What firefighters did you specifically talk to?

A. I didn't talk to any.

Q. How did you learn that the fire was of suspicious origin?

A. We receive our assignment through our central office dispatch.

Q. Did it indicate anywhere on that report that was suspicious?

A. No, sir.

Q. When you went over to investigate, what were you trying to investigate, the cause of the fire or were you investigating some criminality?

A. Cause and origin of the fire.

Q. And you work for the arson squad?

A. Correct.

Q. What is the primary role of the arson squad?

A. Investigate fires for cause and origin.

Q. It is not to investigate criminality?

A. No, sir, not necessarily. Primary job of the arson section is investigate for cause and origin.

Q. You went over there to find the cause and origin?

A. Right.

Q. You didn't know what the cause and origin was or reason for suspicion, am I correct?

A. No, sir, I did not.

Q. Do you know who prepared that report that you read?

A. I didn't read a report, sir.

Q. You read something that said there was a suspicion?

A. We get assignments from our central dispatch office with a location, date, time of the fire, probable cause of that fire and that's it. From there we go out to the scene and make our investigation.

Q. Okay, and you indicated that your captain or captains set certain guide lines down for you to follow?

A. Correct.

Q. Have those guide lines been written out?

A. Some of them, yes, sir.

Q. What about the guide lines about a house being open for trespassers, had that been laid down in writing?

A. I really don't recall any particular memo on any one of these subjects.

Q. Okay.

A. I have to review them again.

Q. You went over to the house on Linhurst?

A. Yes.

Q. Do you remember the address?

A. Not without referring to it.

Q. You want to refer to your notes?

A. 13829.

Q. As you proceeded over there, and then you arrived, how did you know that the house was opened?

A. The doors were open, the windows were broken out.

Q. And if the property owner had been at home, what would you have done?

A. If the property owners were at home at the time we made our investigation, they were present on the premises, we would have had them sign a consent form.

Q. You would have had them sign a consent form?

A. Correct.

Q. What do you mean have them sign a consent form?

A. We would request them to sign a consent form.

Q. You would have requested them, what is the purpose of having them sign that consent form?

A. Giving us authorization to enter the premises to investigate the fire.

Q. Why do you feel you would need that consent form?

A. Protect us.

Q. Protects you from what?

A. Certain rules have been set down. In certain cases, you need permission to enter the premises.

Q. So if those folks had been at home, Lieutenant Beyer,

you would have asked them for consent to enter their home, am I correct?

A. If you are present on the premises, I would have.

Q. If they are away from their premises, then you merely enter, am I correct?

A. If the house is open to trespass, yes.

Q. If the house is open to trespass, now this is going to sound a little facetious to you, was there a sign over there, open up for trespass?

A. No, sir.

Q. How does a house become open up for trespass, how would my house become open up for trespass versus another person's house?

A. It is not secured, open for anybody to enter.

Q. You have a report there, am I correct?

A. Yes.

Q. You want to look at it again, does it indicate anywhere when the firefighters left after 7:04 that they secured the premises?

A. No, sir.

Q. When you got there, who was there, were agents of the fire department there?

A. No, sir.

Q. Were they agents of the property owners?

A. No agent from the fire department there.

Q. No agent from the fire department, correct?

A. Right.

Q. Did you ask one of those other people if you could enter?

A. No, sir.

Q. You merely entered?

A. Yes, sir.

Q. Because of the policy that has been laid down by the Detroit Fire Department, am I correct?

A. Yes, sir.

Q. Okay, let's get back to that consent. If the property owners had been there, you would have asked for his consent, that is to protect you?

A. Yes.

Q. Protect you from what? Would you like me to help you answer?

A. No, sir, I am trying to think of all the different ramifications of that.

Q. Could it be possible, Lieutenant Beyer, it is for the purpose or that citizens, that private property owners for waiving their Fourth Amendment protection, Article 1, Section II of the Michigan Constitution, is that the primary purpose so that they would waive those protections?

A. I would assume so.

Q. Okay. Now, you attended a seven-week course with the Detroit Police Department, am I correct?

A. Yes.

Q. You attended Macomb County College?

A. Correct.

Q. And while you were at Macomb, did you take any law courses regarding search and seizure, perimeter setup and guide lines?

A. Yes, sir.

Q. You did, what course specifically?

A. We were given instructions on search and seizure.

Q. In what course?

A. Law enforcement course, Criminal Justice Institute.

Q. What about Macomb, your two year program?

A. No, sir.

Q. Would you qualify yourself as an expert in the area of search and seizure, Lieutenant Beyer?

A. Not an expert, no, sir.

Q. Okay. Now, you say that you went over there and arrived at 1:04, approximately one o'clock and you entered the house, you found workers there, am I correct?

A. Correct.

Q. You assumed that they weren't from the Detroit Fire Department?

A. Correct.

Q. And I take it that before you entered the house, you knew the water level in the basement?

A. You could see the water level from the outside.

Q. You could see the water level from the outside?

A. Just a matter of looking through the door or window.

Q. What door did you look through?

A. Side door.

Q. You waited — how many minutes did you wait outside before you entered?

A. I would say approximately twenty minutes or so.

Q. So what time did you actually enter then?

A. Close to 1:30.

Q. Okay. So your testimony earlier that you entered at one o'clock was not correct?

A. We arrived on the scene at one o'clock.

Q. And then you didn't enter the premises until 1:30?

A. Approximately.

Q. What did you do during that half hour?

A. We talked to some neighbors.

Q. What was the purpose of talking to the neighbors?

A. Well, find out where the occupants were.

Q. Did you find that the occupants were out of town for the weekend?

A. Correct.

Q. So you couldn't have obtained their consent right then, could you?

A. No, sir, not written consent.

Q. What about verbal consent?

A. Couldn't get ahold of them, sir, we were told he was gone fishing.

Q. Why did you take a seven-week course of CJI, Lieutenant Beyer?

A. Why?

Q. The purpose?

A. To become a certified police officer.

Q. What are you?

A. A certified police officer fire investigator.

Q. You work for the fire department and for the police department, am I correct?

A. No, sir, I work for the fire department.

Q. What was the purpose of you becoming a certified police officer?

A. I would assume to familiarize us with the law and give us legal rights for arrest.

Q. Okay, I will buy that.

You said that if you didn't get consent, you would have gotten an administrative search warrant, am I correct?

A. Correct.

Q. How much trouble would that have been to obtain an administrative search warrant?

A. On a weekend, it would take considerable length of time.

Q. Are the judges available on weekend?

A. Yes, sir.

Q. Why would it take longer on the weekend than weekday?

A. Because an administrative search warrant is a quite lengthy process.

Q. You need probable cause that there was a crime committed, Lieutenant Beyer?

A. No, sir.

Q. Do you need merely fact that there was a fire and you need to investigate it?

A. Correct.

Q. How long would it take you to type that up?

A. To type up an administrative search warrant?

Q. Correct.

A. Hour.

Q. An hour?

A. Yes.

Q. Okay. Do you know why the policy has been set down if you are denied consent you got to get an administrative search warrant?

MR. WOUCZYNA: I am going to object, your Honor, that's an improper characterization of his testimony. I don't remember him testifying as to policy.

MR. RAMSDELL: I will change it some — strike the word policy.

Why would you get an administrative search warrant after you are denied consent?

A. To authorize us to go in and investigate for cause and origin of the fire.

Q. Why do you think you need authorization then?

A. Pardon?

Q. Why do you think you need authorization if you don't get consent?

A. Because we have been denied consent.

MR. RAMSDELL: I have no more questions, your Honor.

THE COURT: All right.

MR. WOUCZYNA: I have no more questions.

THE COURT: You may step down, sir, and thank you.

MARVIN MONROE,

having been first duly sworn by the court clerk to tell the truth, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. WOUCZYNA:

Q. Afternoon, sir, please tell us your name?

A. My name is Marvin Monroe.

Q. What is your occupation, Mr. Monroe?

A. Fire investigator captain with the arson section, Detroit Fire Department.

Q. How long have you been with the Detroit Fire Department?

A. For the past twenty years.

Q. How long have you been with the arson section?

A. Approximately the past twelve years.

Q. Please, tell us what your qualifications are in the field of arson?

A. I have been a fire investigator for the past twelve years, I have a degree in fire science, I have investigated approximately three thousand fires, presently I am designated to training officers for the section, the arson section of the Detroit Fire Department, trained most arson investigators in the state police fire marshall section and other communities, I have operated in that capacity for the past seven or eight years.

Q. Have you attended any special schools for knowledge?

A. Numerous seminars throughout the state and I am usually a lecturer at most seminars at the state.

MR. RAMSDELL: I will stipulate to this gentleman amazing credentials.

MR. WOUCZYNA: Thank you, but I am not through.

Do you have another qualification, are you a licensed attorney within the State of Michigan?

A. Yes, I am.

Q. Sir, in your capacity with the Detroit Fire Department, do you have a supervisor capacity?

A. Yes, I do.

Q. And in that particular supervisory role, have you either set down policies or do you set down policies as to entry by your personnel to investigate fires?

A. Yes, our office has such a policy and I took an active part in establishing that policy.

Q. Could you tell us what that policy is in the Detroit Fire Department?

A. Well, the policy that we have regarding entries of fire scenes, covers a multitude of situations. One, we encourage our investigators to make the scene and make the association if at all possible where the fire opening is in effect. Our day crew does most of the fire scene investigation, we tell them to make an entry into the property that had a fire the night, the previous night, if the property is open to trespass. If it is severely fire damaged, we tell them to make that entry and make the investigation. If the property is occupied, or if it is a business place and people are trying to conduct business, then we instruct the people to ask for consent or to obtain an administrative search warrant where appropriate. If the property is occupied by juveniles, someone without adult authority, we also have instructed our investigators not to make the scene unless there is an adult that can guarantee entry at that time.

We have looked at the Tompkins decision and have judged it to be a test of reasonableness between the mandate of the fire department to make an investigation for cause and reasonable expectation or privacy of the people that may reside there and conducting business.

Q. Thank you. So to put it another way, your arson investigators do not have discretion on whether or not to enter a place with or without a warrant; is that correct?

A. That's absolutely correct.

MR. WOUCZYNA: I have no further questions.

THE COURT: Let me ask you a question. What happens if the policy conflicts with the law?

WITNESS: Naturally the law would prevail, your Honor.

THE COURT: All right.

CROSS EXAMINATION

BY MR. RAMSDELL:

Q. Captain Monroe?

A. Yes, sir.

Q. You say that if a house is open for trespass, that under the policy of the Detroit Fire Department or arson squad or police arson unit, you give them permission to enter; is that correct?

A. No, that's not entirely correct. Only if the fire had occurred the previous night and this is the day shift, the following day shift.

Q. Okay, but you do give them permission to enter or you grant them the authority through your unit to enter if there is, if it is open?

A. Well, it is our policy, I think the court and the law will grant the authority to search a situation, but it has been our policy as to decision.

Q. So your policy is to enter if you feel it's open for trespass?

A. Yes.

Q. And you thoroughly are knowledgeable of the *Tyler versus Tompkin* case, 1978 case, am I correct?

A. Yes, I am.

Q. You are also thoroughly aware of Judge Levin's decision in *Tyler versus People?*

A. Yes.

Q. 1977?

A. Yes, sir.

Q. And could you, if you — since you are thoroughly knowledgeable in that area, could you indicate the exceptions to the warrant requirement that have been indicated in the cases?

A. In the Supreme Court case?

Q. First, let's get *People versus Tyler*, what exceptions?

A. Well, I believe most of those exceptions were overruled, so I would prefer to speak to one, the exceptions that were derived at the United States Supreme Court decision.

Q. Captain Monroe, attorney Monroe, am I correct, that the Tyler Tomkins case in 1977 affirmed the Michigan decision?

A. In part, it satisfied this, it went too far in restricting fires.

Q. Okay. Now, what about — am I correct that in *People versus Tyler*, 1977, Justice Levin said that a valid consent can be an exception to the warrant requirement?

A. I believe that's correct.

Q. Okay, did he also indicate that abandonment of the premises will permit fire investigators to enter?

A. That's correct.

Q. Okay. Did the U.S. Supreme Court overrule the consent and abondonment section or exception that were enunciated by Justice Levin?

A. No, they did not.

Q. So we still have abondonment as an exception?

A. Yes, we do.

Q. If I am correct, the Michigan Supreme Court indicated that once the fire had been doused and the firefighters have left, to return, they must have a warrant or shown of clear exception.

A. I believe the wording of the Michigan Supreme Court was the fire department had exited the premises the moment the last flame was doused was the interpretation of the Michigan Supreme Court decision.

Q. What was that again?

A. That the fire department mandate was to exit the premises once the last flames were doused in a fire, that they did not have a mandate to determine the cause of a fire or to continue in the property once the flames were doused.

Q. They didn't have that right, let me read something to you from the case.

MR. WOUCZYNA: Your Honor, excuse me. At this point I am going to pose a legal objection because I think we are now discussing something that your Honor is going to rule upon and we are asking an ultimate, I think he is asking an ultimate opinion from this witness which is going to be in your Honor's realm, so I am asking that any legal argument be made to your Honor.

MR. RAMSDELL: Your Honor, may I say something in reference to that?

THE COURT: Yes.

MR. RAMSDELL: Mr. Wouczyna indicated we have an expert here, we have an expert that set down policies of the Detroit Fire Department, we have an expert that is also an attorney, and what I am trying to do is find out how much knowledge that expert actually has in reference to the Tyler Tompkins and *People versus Tyler* cases in regard to the policies that he set up and he said that — he indicated, evaluated the Tyler Tompkins case and that was part of the policy that the fire department had set up and that's what I am getting into.

THE COURT: Go ahead.

Q. (By Mr. Ramsdell): Let me read something to you, tell me if it's parallel to what you just said. If there has been a fire, the blaze extinguished, the firefighters have left the premises,

a warrant is required to reenter and search the premises unless there is consent or the premises had been abandoned.

A. Where about are you reading that from?

Q. I am reading page 583.

MR. WOUCZYNA: That's the basis of my objection, your Honor. He wants to present argument to the court, he is not able to do that without a brief or notes. He can't respond like I can during an oral argument to the court just by asking him bits and pieces out of the court decision. It is vastly unfair, especially when your Honor is going to have to rule here whether or not it is reasonable or unreasonable.

THE COURT: This witness appears to me to be very well versed, not just qualified, very well qualified, but I think his question — now, where are you reading it from?

MR. RAMSDELL: I am reading it from page 583.

WITNESS: That's the Michigan decision?

MR. RAMSDELL: Yes.

WITNESS: The policy we have established is totally based on the United States Supreme Court decision regarding the Tyler case, not the Michigan decision.

Q. (By Mr. Ramsdell): Okay, and you are fully aware of that decision, am I correct?

A. I hope that I am.

Q. Am I correct in saying, tell me if I am wrong, throw the chair or something at me. That the U.S. Supreme Court broadened the authority of the arson investigation to enter and investigate the cause of fire?

A. They very much broadened their authority when they reevaluated the Tyler Tompkins decision as rendered by Michigan. In Michigan, much of the evidence that was thrown out, the entry the second day according to the Michigan decision were illegal, according to the United States Supreme Court decision, they were mere continuations and not reentries.

Q. Am I correct, Captain Monroe, that you said the word mere continuation?

A. Yes.

Q. In the fire department in the Tyler Tompkins case, was he not present during the extinguishment of that fire?

A. Yes.

Q. Did he not return to investigate the cause of that fire?

A. Briefly and then left.

Q. He did return, am I correct?

A. That's correct.

Q. And was Detective Webb also present at 3:30 A.M. while that fire was being extinguished?

A. Yes, he was.

Q. Did he not also return?

A. Yes, he did.

Q. And did they not say in their language that that return was merely a continuation of the fire investigation?

A. Yes, they did.

Q. And did they also not indicate, Captain Monroe, that there were exigent circumstances because the fire was, it was difficult to determine the origin of the fire because of the darkness, because of the steam and because of the water?

A. Because of the darkness, steam and smoke was the correct interpretation.

Q. Good. And are those not the reasons why they allowed them to go back and search within a five-hour period?

A. That and also the finding that it was reasonable under the circumstances.

Q. But that reasonableness, am I correct, Captain Monroe, was predicated upon the exigent circumstances that were enunciated in that case?

A. No. The reason was based upon that and more. It was based on the mandate of a fire department to determine the cause of a fire within a reasonable time balance against the

reasonable expectation of the privacy of the party in the premises which in that particular case, they said it was not unreasonable to investigate a furniture store fire that had suffered severe fire damage where the owner was not intending to go back into business that next day or conduct business, it did not interfere with his activities.

Q. You read the fine decision by Justice Stewart?

A. I read all of the decisions.

Q. I would like to read page 500 in the Law Ed. edition which would be probably your memory, page 511. Information —

MR. WOUCZYNA: I am going to object, your Honor. He can ask questions, I am going to object to reading bits and pieces again.

MR. RAMSDELL: It runs contrary to what Captain Monroe just said about his interpretation of the case, your Honor.

THE COURT: Suppose it did, ultimately I am going to have to make the decision.

MR. RAMSDELL: Right. In fact, I will lay off. It is your witness.

REDIRECT EXAMINATION

BY MR. WOUCZYNA:

Q. Captain, if your day shift is unable to make the scene to investigate, what is the policy in regard to the afternoon shift or the scene the next given day?

A. That would in all probability be too late, therefore, it is encouraged to obtain consent or an administrative search warrant if it goes beyond the initial day. After the fire, we have a policy if the property is locked and secured, we think that there is an expectation of privacy, therefore, we leave a tag for the owner to contact our office. Like I say, if someone is there

and using the premises, then there is an expectation of privacy we honor and ask for consent or obtain an administrative search warrant. If there are juveniles that allows us entry, we have a policy not to enter unless we have, unless there is an adult there. We have very strict rights to privacy of people in the City of Detroit.

Q. That's based on your policy after balancing the test found in the Tyler Tompkins case; is that correct?

A. That's correct.

MR. WOUCZYNA: I have no further questions.

THE COURT: You may step down, thank you.

MR. WOUCZYNA: I have no further witnesses to present, your Honor.

Monday, April 13, 1981

THE CLERK: Case number 80-07406, People versus Raymond and Emma Jean Clifford, the offense is arson burning of a dwelling house.

Your Honor, on March 30, 1981, the motion to suppress the evidence and quash the information was heard and taken under advisement until today's date.

THE COURT: All right.

MR. WOUCZYNA: James Wouczyna appearing on behalf of the people, your Honor.

MR. RAMSDELL: Jack Ramsdell appearing on behalf of the Cliffords, your Honor.

THE COURT: There were two questions here, the entry, I forgot the officer's name and the search warrant.

MR. RAMSDELL: John Beyer.

THE COURT: His entry and the search warrant. I have no problem at all with that search warrant, it doesn't show probable cause for the magistrate to issue it. In my opinion

there was just nothing there. As I understand the officer just went and said I have information that a fire was there and that was about it, on the face of the search warrant; is that right?

MR. WOUCZYNA: Well, he gave his expert opinion by saying that is was incendiary in nature, your Honor.

THE COURT: Yes, but based upon what facts. The search warrant will be quashed.

Now, the other point is not as simple, I mean the entry. As I understand, they went there six hours after the fire.

MR. WOUCZYNA: Approximately.

THE COURT: Yes, and they were possessed with a note from someone else who had been there and suspected foul play or something to that effect, but that's all he left for the officer, Mr. Beyer that went there.

When Mr. Beyer arrived, his testimony that he treated this situation similar to a trespasser's situation, that it was open and anybody could have gone in, said that some man was in the basement pumping water, he had an opportunity to obtain a search warrant, there is no question about that. Is there six hours? They said they were busy that day, I remember that.

MR. WOUCZYNA: He had an opportunity to, but there would be nothing to base a search warrant on, your Honor.

THE COURT: Well, if they had nothing to base it upon, why did they go in?

MR. WOUCZYNA: Because *Michigan versus Tyler* is, my opinion, allows you to go in.

THE COURT: Without probable cause?

MR. WOUCZYNA: Yes, sir, most definitely without probable cause, that's the essence of the case.

THE COURT: Then going on exigent circumstances then?

MR. WOUCZYNA: Yes, sir.

THE COURT: You claim these were exigent circumstances, a man is there working for somebody,

presumably a fire adjustor or the insurance company and he is pumping water out, but the fire is already out?

MR. WOUCZYNA: Yes, sir, that's not the test though, your Honor.

THE COURT: I know, exigent circumstances. What were the circumstances then?

MR. WOUCZYNA: Well, I will get my notes back out again that we argued.

THE COURT: I mean that caused this to come under the doctrine of exigent circumstances, that means that to me, that something out of the ordinary is going on here and it is unusual and if you don't go in right then, something is going to happen, that's what exigent circumstances means to me.

MR. WOUCZYNA: But Tyler didn't say you have to go in right away, you don't always have to have exigent circumstances under Tyler.

THE COURT: If you don't have to have them, then what do you have to have?

MR. WOUCZYNA: You have to go in within a reasonable amount of time, you Honor, certainly. There would be no dispute if the investigator went in when the fire was in progress.

THE COURT: Yes, what about that?

MR. WOUCZYNA: I don't think anybody is going to challenge, I don't know about this, but certainly they have the right to go in.

THE COURT: And extinguish the blaze.

MR. WOUCZYNA: When they leave for whatever reason and come back, our position is, if you read Tyler —

THE COURT: What would they back for?

MR. WOUCZYNA: Well, there was a case where they went and procured some equipment to come back and further their test. In Tyler, they came back with the actual arson investigator, the chief of police went in and tried to determine

the cause of the fire, he then left and the following morning he returned with the arson investigator and Tyler allowed that.

THE COURT: Did they rule on exigent circumstances?

MR. WOUCZYNA: In Tyler, they discussed a myriad of factors, your Honor, to consider.

THE COURT: Right.

MR. WOUCZYNA: Those were the things that we discussed with your Honor.

THE COURT: What's your theory here, they came back within a reasonable period of time?

MR. WOUCZYNA: Yes, sir, because the investigation was the same day the fire had severely damaged the house. It was uninhabitable, the occupants weren't at home, the building had not been secured yet, the building was open for trespass which means anyone could have walked in and eluded it's damage or destroyed or tampered with any evidence that was present to demonstrate arson.

There were other people that had, that were working within the building, and that to the Detroit Fire Department is very important. They don't have arbitrary rules or policies that just allows them to go in whenever they want. They do have some rules to establish reasonableness, they followed reasonableness in this case, your Honor.

THE COURT: All right, Mr. Ramsdell.

MR. RAMSDELL: I would like to respond to that, your Honor. I think the few statements from Tyler, and I read the holding information, we hold that an entry to fight a fire required no warrant. We are conceding that to Mr. Wouczyna that once in the building, officials may remain there for a reasonable time to investigate the cause of the fire, the cause of the blaze thereafter and they emphasize thereafter. Additional entry to investigate the cause of the fire must be made pursuant to the warrant procedure governing an administrative search at the bare minimum. And just because these people

are working in the basement don't tell the arson squad they have a right to come in, and as I remember, it was, I think, March 30 we had the preliminary exam and my memory seems to be fading slightly, but according to the Tyler decision, they said there is three times you can come in without a warrant, that is one if we can show abandonment, number two if we can show consent, number three if we can show exigent circumstances, and the city failed to show exigent circumstances, and that's the key, your Honor, it's a very fine point that the Supreme Court emphasized.

They say we are not about to develop an exception to the warrant requirement just based upon the fire. The same year, the Supreme Court in *Menchi versus Arizona* said we are not merely about to make exceptions because of the homicide just because we had a fire, just because we had a homicide, doesn't give them the right to enter, they have got to show exigent circumstances because we have got such a valuable right that our country and constitution and Supreme Court is protecting our rights to be free from illegal search and seizure, especially in a home, your Honor.

THE COURT: As I said, this is not as simple as the search warrant. I have not made up my mind on this matter, I am going in your direction, but at this point I have not decided fully that they did not have a right to go in under those circumstances so I am going to need a little more time.

MR. RAMSDELL: I submitted a brief, your Honor.

THE COURT: I know. By Thursday of this week, if you want to come in and get it, okay, or I could call you or send it by mail, my decision. What do you want to do, come back?

MR. WOUCZYNA: I will be in here, your Honor.

THE COURT: You will be here Thursday?

MR. WOUCZYNA: Yes, your Honor.

THE COURT: She informs me, we are well past the final conference, so you are going to come back. Can you be back Thursday? If not, I will — what about Wednesday?

MR. RAMSDELL: I was leaving town Wednesday, your Honor.

THE COURT: What about Tuesday?

MR. RAMSDELL: Tomorrow?

THE COURT: Yes, because we are past the final conference. I will give the ruling. You will be here tomorrow, Mr. Wouczyna?

MR. WOUCZYNA: Yes, sir.

THE COURT: Tomorrow at nine o'clock.

MR. RAMSDELL: Thank you, your Honor.

Tuesday, April 14, 1981
Detroit, Michigan

THE CLERK: Case number 80-07406, People versus Raymond Clifford and Emma Jean Clifford, offense is arson burning of a dwelling house.

MR. WOUCZYNA: People.

THE COURT: All right. I adjourned this case from yesterday for a decision today. Do either one of you have anything new that we have not talked about?

MR. RAMSDELL: I don't.

MR. WOUCZYNA: Nothing new that we haven't talked about, your Honor.

THE COURT: Well, the way you are saying that, you might have something else to say?

MR. WOUCZYNA: Well, you know, again, your Honor —

THE COURT: Well, see, I remember everything we have gone over. If you think I don't, go ahead and refreash my recollection, feel free to speak out.

MR. WOUCZYNA: Again, you know, I just want to say, your Honor, that I don't think that I am not sure that

everyone was talking about the same test here that *Michigan versus Tyler* states should be used.

THE COURT: Well, you go ahead and tell me what I should use.

MR. WOUCZYNA: Again, your Honor, my interpretation in *Michigan versus Tyler* is that that case specifically says that the fire department does not need to have a search warrant to go into the premises after a fire has been extinguished as long as they go in within a reasonable amount of time. After the blaze has been extinguished and then Tyler talks about —

THE COURT: That's all it says? What about exigent circumstances, do they have to exist at the time?

MR. WOUCZYNA: Yes, your Honor, there have been certain circumstances, it's not an unlimited test. When they talk about what is a reasonable amount of time, they talk about certain factors and in that —

THE COURT: Well, tell me what are — what exigent circumstances are, the exigent circumstances here?

MR. WOUCZYNA: Exigent circumstances are facts or circumstances that will exist in a particular case to justify firefighters going in within a reasonable amount of time.

The Tyler case they talk about, steam, smoke and darkness, they also said each case falls upon it's own particular facts because of the uniqueness of the firefighting situations. You can't say that the — that there are one through ten exigent circumstances that apply to each case. Each case has to look upon it's own.

And then I presented to the court through testimony and argument that exigent circumstances here to show that it was not unreasonable, the amount of time that elapsed from when the fire was extinguished until the time —

THE COURT: I don't think the time has anything to do with this case.

MR. WOUCZYNA: Well, I believe it does, your Honor.

THE COURT: Why?

MR. WOUCZYNA: Because I would be willing to submit if they went in two days later, that —

THE COURT: Under the same circumstances?

MR. WOUCZYNA: Under the same circumstances, it might be unreasonable.

THE COURT: Well, I thought it was the circumstances rather than the time?

MR. WOUCZYNA: I think it is a combination of both, but I don't think six hours was unreasonable.

THE COURT: But what were the circumstances that would justify them going in, that's what I am asking you?

MR. WOUCZYNA: Well, six hours in and of itself is one circumstance I submit.

THE COURT: All right.

MR. WOUCZYNA: And then as I discussed yesterday, six hours was the same day the investigation was made, the same day as the fire had occurred that the building was severely damaged. It was uninhabitable, there was no one living in the building at the time, the building had not yet been secured by either the owners or the representatives of the owners, thereby the building was open for trespass, which I think is very critical, your Honor, that building was susceptible to having anyone go in whether it be children for the sake of child's play going in or anyone else going in and possibly destroying any evidence that may exist for the fire department to determine the cause of the fire.

There were other people working on the premises, still trying to clean it up. It had been demonstrated that these officers had other assignments that particular day and they did have a policy that they followed within the department and they just didn't have —

THE COURT: Well, the policy is great, nothing is wrong with the policy, but we are talking about the law.

MR. WOUCZYNA: Yes, sir, and that there was all the water on the premises —

THE COURT: Now you are getting down to something that might —

MR. WOUCZYNA: Just as if or just as in Michigan —

THE COURT: As I understand, the basement was flooded, the man was pumping the water out?

MR. WOUCZYNA: Just as in *Michigan versus Tyler*, the fire investigators had to come back because they could not complete their investigation because of the steam, smoke and darkness in that case. We presented testimony here, Lieutenant Beyer said they could not have found the evidence of arson in this case until that water was pumped out. I believe he testified that there was a foot or two of water in that basement and the articles he found from which he concluded that it was of an incendiary type nature, the origin of the fire, was under the water and once the water was pumped out, then it was found.

THE COURT: All right, Mr. Ramsdell, do you want to respond?

MR. RAMSDELL: Yes. Maybe I should have a forensic because I was here March 30 and I did not hear him state that the items were under the water. That's one factor that's rather relevant. Number two, he didn't state a foot or two. I think he said it was around a foot. The fact that Lieutenant Beyer said that, yes, we go in if we feel it's open for trespass. I said why, if they are home, what do you do, he said if they are home, we ask for consent. I said why do you ask for consent, he said to protect ourself. I said to protect yourself, why, then he sat about three or four minutes.

THE COURT: Not that long, I wouldn't let him sat that long.

MR. RAMSDELL: Maybe two, it seemed like an eternity to me. He never came up with an answer. My point is Lieutenant Beyer did not know anything about exigent circumstances, he received a memo from some unknown person to respond to Linhurst. In the meantime, he investigated another fire, he also had lunch and then he goes over to Linhurst. There were no exigent circumstances shown by any of the witnesses for the prosecution. All he said was, and this is the only thing they have got going for them, is that there was water in that basement and that's it. And the Tyler decision indicated that there were exigent circumstances, they could not investigate at the time of the fire because of the nighttime and Tyler was very early in the morning. This case was in the daylight, there was no evidence of steam, there was no evidence of water other than Lieutenant Beyer coming in and saying that he saw some water, that's when he went in. But he waited a half an hour. I don't think there are exigent circumstances here, and the trespasser invasion they were talking about.

Lieutenant Beyer even indicated that the insurance people were there, the agents of the Cliffords were in the house working, that doesn't give the fire department the unilateral right to enter the premises. At the minimum, your Honor, at the bare minimum, it wouldn't have been any real inconvenience to get an administrative search warrant, they emphasized over and over again in the Tyler decision, Justice Levin emphasizes it in *People versus Tyler* and Justice Stewart emphasized it in the major case of *People versus Tyler*.

It is our commission they did not have exigent circumstances. In the Supreme Court case of 1974, Vintresca said when you search a home, you have got to show an exception, without a warrant you got to. The burden is on the prosecutor

to show by clear and convincing evidence that there is a justification and they narrowed the justification. I think that tagging on the water is not enough, your Honor.

Beyer didn't even know about the water, he didn't know anything other than the fact that he responded to the fire six hours after the fire was put out.

THE COURT: Well, isn't he the one that said he saw the man pumping the water out?

MR. RAMSDELL: Sure he did.

THE COURT: You just said he didn't know anything about the water.

MR. RAMSDELL: When he responded over there, he had no knowledge of the exigent circumstances.

THE COURT: On the way. After he got there.

MR. RAMSDELL: Then he saw some water being pumped out. As Lieutenant Beyer indicated, he not only looked in the basement, he looked all around that house. I doubt water was up on the second floor and third floor.

THE COURT: When he went in the basement, that's where he say he found the device.

MR. RAMSDELL: A frying pan or something.

THE COURT: You mean what he found?

MR. RAMSDELL: Yes.

THE COURT: But it was under some steps, stairway.

MR. WOUCZYNA: It was near the step on the floor, your Honor, with a cord running under the carpeting connected to a timer.

THE COURT: You say he didn't have any right to go in at all?

MR. RAMSDELL: I say he did not have a right to go in, not at that time, your Honor.

THE COURT: Not even in the basement?

MR. RAMSDELL: Not even in the basement.

THE COURT: All right.

MR. WOUCZYNA: Your Honor, just to respond. I differ with Mr. Ramsdell.

THE COURT: Well, you have been differing all along.

MR. RAMSDELL: We are not getting along, I can tell.

THE COURT: Well, you are getting along.

MR. WOUCZYNA: Your Honor, when you read *Mighigan versus Tyler*, there is no requirement, it says there is no requirement that they have any kind of warrant as long as they go in within a reasonable —

THE COURT: Well, he has agreed with that.

MR. WOUCZYNA: He doesn't, he was maintaining they should get an administrative search warrant.

THE COURT: If they had time, he said in this case they had ample time.

MR. WOUCZYNA: I disagree with that, your Honor.

THE COURT: You do?

MR. WOUCZYNA: You do not have to.

THE COURT: He didn't say you had to have a search warrant, that isn't my understanding of his argument, that you have to have a search warrant to go in. If there are exigent circumstances, they don't have to run to the magistrate and get a warrant, they could go right then, I think we all agree to that, if there are exigent circumstances. He doesn't have to go, the fireman doesn't have to leave and let the building burn down or burn up the neighborhood getting a search warrant, see?

MR. WOUCZYNA: It's not even that narrow, your Honor, because when they talk about it's a reasonable time test and when they talk about looking at what is a reasonable time, one of the things you consider is exigent circumstances. One of the things, the other thing is reasonable expectation of privacy, reasonable time. You look at the amount of time. See, by maintaining that they should have gone and got an administrative search warrant or a probable cause search warrant, if

that requirement were present or if the court in *Michigan versus Tyler* said that was a requirement, *Michigan versus Tyler* would have fallen because there is no way with the steam, smoke and darkness in Tyler that those people would have had enough evidence to go and get any kind of search warrant because they couldn't conduct their investigation sufficiently. The same thing here, without that water being dissipated, there is no way that Lieutenant Beyer, maybe if he put on, I don't know, some sort of underwater equipment, could have found that.

THE COURT: All right, I am going to let you close out.

MR. RAMSDELL: One last.

THE COURT: Yes, this is it.

MR. RAMSDELL: Mr. Wouczyna seems to misinterpret the administrative search warrant that came in the Barlowe decision. It says you can get an administrative search warrant without probable cause and criminality. What you need is a general regulatory scheme like these gentlemen have worked up investigating arsons. Number two, you were denied entry into the premises, you don't have probable cause that it was an arson and then you go on get that warrant.

They emphasized it over and over, Justice Levin indicated on page 579, to determine the cause of fire, you need to get an administrative search warrant. Justice Stewart emphasized in *Michigan versus Tyler*, get a warrant. There is no great inconvenience to the fire department to get this type of warrant. They don't need to show probable cause, all they need to show is that there is a fire and if they didn't have some kind of control over that, your Honor, then what we do, we have the fire department with their nozzles, just load up a basement with water and that's it. Water will be the key thing.

THE COURT: You mean they would create a situation?

MR. RAMSDELL: They create their own situation, we will have the water. I don't feel — how do you know what is in

the basement, how do you need, you know, what to investigate. He just said he saw water, there is the entire house that Lieutenant Beyer investigated, he was upstairs, he was downstairs, he was all over the place. So we are supposed to go along with the theory there is water in the basement. He doesn't need a search warrant. That is the most, not the most ridiculous, but almost. That's all.

THE COURT: The motion to suppress the evidence that was found by that entry is denied. I find that there were at that time exigent circumstances that would permit them to go in. Now, the other, the search warrant, that's out.

MR. WOUCZYNA: Thank you, your Honor.

MR. RAMSDELL: Thank you, your Honor.

CERTIFICATE

STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

I, Shirley McClain, Official Court Reporter in and for the above County and State, do hereby certify that I have recorded stenographically the proceedings had and testimony taken in the afore-entitled cause, before the HONORABLE HENRY HEADING, Recorder's Court Judge, at the time and the place hereinbefore set forth.

I do further certify that the foregoing transcript, consisting of pages 1 through 58 inclusive, comprise a full, true and accurate transcription of my said stenographic notes.

/s/ SHIRLEY MCCLAIN

Shirley McClain, CSR-2311
Official Court Reporter